shipped bauxite to Germany during December, 1941, at or about the time of the declaration of war between Hungary and the United States. In November, 1939, Fritz von Opel, in response to a letter from Giulini Brothers, of Germany, requesting his service in getting the production in the mines resumed, went to
3383 Hungary "to speed up production in the bauxite mine". The letter to Fritz von Opel stated in part, "you would do meritorious service for the raw material supply of the German aluminum industry and the entire war economy of Germany if you would tackle with all your energy the resumption of production in the mines". In addition, during 1939 plaintiff guaranteed a loan of 32,000 Swiss Francs ($7,000) to Transdanubia Bauxite, A. G., which loan was extended at quarterly periods until November 17, 1942, when plaintiff was advised that its collateral had been released. While it is true there is no showing that plaintiff executed any control over its subsidiary after December 1941, it appears plaintiff never took affirmative steps to sever its relations with Transdanubia. Thus plaintiff had an interest in and an association with an enemy corporation during World War II which apparently supplied war materials to the enemies of the United States.

From what has been stated, it would be difficult in my opinion to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant and it seems to me the plain intent of the Trading with the Enemy Act would be defeated by ordering a return of the vested securities.

During the oral argument of this case, while counsel for the defendant was presenting his contentions with regard to the claim of existence in favor of Wilhelm and Marta von Opel of a usufructuary interest in the vested properties, plaintiff's counsel interrupted to suggest that granting the Court should find such interest existed at

the time of vesting, nevertheless since Fritz von Opel, a neutral, had a well defined separate interest which might be determined by the Court, he would be entitled to recover to the extent of such interest. This point was enlarged by one of plaintiff's counsel in his rebuttal argument. No such claim is made by the pleadings. This suit was not brought by Fritz von Opel upon a claim of division of interests which he held together with his parents, but was brought by a corporation of Switzerland which claimed to be entitled to a return of the vested American securities, based upon a claim that Wilhelm and Marta von Opel held no interest "directly or indirectly, in whole or in part", in the properties. At the time the case was pretried, when the parties were called upon to state the issues to be litigated and to make any amendments of the pleadings necessary to present new issues, it was agreed the action was to recover property belonging to plaintiff corporation in which there was no enemy interest. Without consent of the defendant, the Court should not at this late time adjudicate an issue where the interest
3384 sought to be established is different from that set forth in the pleadings and where the party plaintiff also is different. Defendant well may desire to present other factual information and develop legal arguments which only partially have been made in this case.

Judgment will be entered in favor of the defendant.

/s/ BOLITHA J. LAWS
Chief Judge

February 21, 1949

Findings of Fact and Conclusions of Law
Filed May 6, 1949

3385 1. Plaintiff, Uebersee Finanz-Korporation, is a corporation organized under the laws of Switzerland, with its principal office and main place of business in Switzerland.

2. Plaintiff owned and held stock of certain corporations located in the United States; these assets were vested by the Alien Property Custodian in June and July of 1942 pursuant to the Trading with the Enemy Act.

3. 97 per cent of the stock of plaintiff corporation is held by Fritz von Opel.

4. Wilhelm and Marta von Opel are the parents of Fritz von Opel and at all relevant times they were nationals and residents of Germany. Mrs. Elinor Sachs, nee von Opel, is the sister of Fritz von Opel and is a resident of Switzerland.

5. Fritz von Opel was a citizen of Germany from birth until November 21, 1939, and as a result of his engaging in competitive activities in Germany his name had, by 1929, become a household word and he enjoyed a prominent position in the esteem of the public.

6. After December, 1929, Fritz von Opel never resided in Germany, but lived successively in the United States, Belgium and Switzerland, where in 1934 he became a Swiss Domicilliary. Between December 1930 and August, 1939 he went to Germany for short visits, totalling about ten per cent of the time.

7. On November 21, 1939 Fritz von Opel was naturalized as a citizen of Liechtenstein; however, the only times

he was ever in Liechtenstein was when he was traveling through it. He has been in the United States since May, 1940. The Liechtenstein naturalization law expressly permits the principality under extraordinary circumstances to waive the condition of residence.

8. Fritz von Opel's naturalization in Liechtenstein was accomplished under a waivef of the usual Liechtensteinean naturalization laws which provide for extensive residence. In connection with obtaining his citizenship, Fritz von Opel paid approximately $10,000, two-thirds to a community and one-third to the principality. The 3386 naturalization laws of Liechtenstein require some payment for acquisition of citizenship by naturalization.

9. Fritz von Opel never took an oath of allegiance to the principality of Liechtenstein and he states as his reason for this that he was too sick to travel at the time he was to take his oath. Under the laws of Liechtenstein, it is within the jurisdiction of the executive or an authority empowered by him to administer the citizenship oath after the state citizenship has been granted. The citizenship oath has only to be taken by male persons of full age.

10. Statements made and acts performed by Fritz von Opel between the time in 1939, when he became a naturalized citizen of Liechtenstein, and 1941, when war was declared by the United States, indicate a continued interest in the welfare of and sympathy for Germany.

11. Both Switzerland and the principality of Liechtenstein were and have remained since December 7, 1941, neutral countries.

12. In 1929 General Motors Corporation purchased 80% of the outstanding stock of Adam Opel A. G., a German

corporation engaged principally in the manufacture of automobiles; 10% of the remaining stock, 600 shares, were owned by Wilhelm and Marta von Opel subject to an escrow agreement with General Motors.

13. In 1931, the economic situation in Germany became very serious and Foreign Currency Controls were becoming more restrictive every day.

14. Both Fritz and Wilhelm von Opel were greatly worried during the late summer of 1931 over the possibility of a financial collapse in Germany and a repetition of the inflation of a decade earlier and both had discussions with associates concerning means of avoiding the danger.

15. On October 2, 1931, Fritz and Wilhelm von Opel were advised by Dr. Hachenburg, one of Germany's leading lawyers, that a valid gift could be made by Wilhelm to Fritz von Opel of the 600 shares of Adam Opel, A. G., stock without violating existing Foreign Currency restrictions.

16. This gift would be valid because Fritz von Opel was at the time a devisen auslander, the term applied by German law to a person not residing in Germany and hence not subject to the German foreign exchange control legislation.

17. Thereafter on October 5, 1931, Wilhelm and Marta von Opel by a deed of gift gave Fritz von Opel, their only son, the remaining ten per cent of the Adam Opel A. G. stock.

18. This was intended to be a gift of part interest of the owners and was not intended to be a sham transaction; however, the primary object of the transaction was to

obtain payment upon sale of the Opel shares in the form of gold or American currency, instead of German
3387 reichsmarks. A second purpose of the gift was to make financial provision for Fritz von Opel. Legal title to the 600 Opel shares passed to Fritz von Opel by the agreement of October 5, 1931.

19. On October 17, 1931, Fritz von Opel, pursuant to the provisions of the escrow agreement of 1929, sold General Motors Corporation the 600 Opel shares which were the object of the gift for American currency and securities.

20. After various intermediate financial transactions, all of the proceeds from the sale of the Opel shares were transferred into Uebersee Finanz-Korporation, plaintiff herein, which is a Swiss holding company acquired for the purpose of holding the proceeds of the sale of the Opel shares.

21. Thereafter, these funds were invested in various corporations and other assets in the United States and elsewhere, including the property vested by the Alien Property Custodian. Subsequently, prior to 1936, these assets were transferred to plaintiff.

22. Since 1935 and at the time of vesting plaintiff corporation owned one hundred per cent stock interest in Transdanubia Bauxite, A. G., a mining corporation in Hungary.

23. During the year 1939 a loan was made by a Hungarian Bank to Transdanubia Bauxite, A. G., said loan being guaranteed by a Swiss Bank.

24. In 1940 the said loan was increased by the Swiss Bank to a total amount of 32,000 Swiss Francs ($7,000).

25. As security for this guarantee, plaintiff corporation had caused the Adler Bank, a Swiss Corporation, to place with the Swiss Bank, 32,000 francs as collateral for the guarantee.

26. At quarterly periods the guarantee was extended by plaintiff corporation through its agent, the Adler Bank. In March, June and September of 1942, Dr. Joseph Henggeler, a director of plaintiff corporation, requested the Adler Bank to cause the Swiss Bank Corporation to extend its guarantee to the Hungarian Bank. On each occasion the requested extension was made.

27. Transdanubia Bauxite A. G. repayed the loan and on November 17, 1942, plaintiff corporation was advised that its collateral had been released.

28. Throughout the war the shares of the Transdanubia Bauxite A. G. were held by plaintiff corporation.

29. The record is bare of any evidence as to whether the shares of Transdanubia Bauxite, A. G., from 1940 through 1945, inclusive, were voted, or, if so, who voted them.

30. After December 7, 1941 plaintiff corporation never took any affirmative steps to sever its relations with Transdanubia Bauxite, A. G.

3388 31. From December 13, 1941, until the end of the war, a state of war existed between Hungary and the United States. During October, November and December, 1941, Transdanubia Bauxite, A. G. shipped bauxite to Germany. By contract executed in March, 1940. Transdanubia Bauxite, A. G. agreed to ship bauxite to Germany until the end of 1942. However, in the spring of 1941 Fritz von Opel refused requests from the officers

of Transdanubia Bauxite, A. G. for additional funds in order that mining operations could be continued and he suggested that the mines be sold or leased. The record does not reflect that the plaintiff corporation or Fritz von Opel received any income from Transdanubia Bauxite, A. G. at any time.

32. Under the terms of the gift agreement dated October 5, 1931, it was agreed that Wilhelm and Marta von Opel should have a usufruct established in their favor.

33. According to the laws of Germany the instrument of October 5, 1931, did not immediately create in Wilhelm and Marta von Opel a usufruct in the property which was the subject of the gift because of the omission in the instrument to provide for an immediate delivery of possession or co-possession of the property to Wilhelm and Marta von Opel and because no such delivery of the property was then made.

34. A valid and complete usufruct is created under German law when (a) the person holding the legal title and the usufructuary agree that a usufruct shall be created and (b) when the person holding the legal title delivers to the usufructuary possession or co-possession of the property.

35. Under German law, valid delivery sufficient to create a usufruct may be brought about by symbolic delivery, as in the case of securities, by the delivery of the key to a safe deposit box in which the securities are placed to the usufructuary or his agent.

36. A usufructuary may follow the ascertainable proceeds of the original property subjected to the usufruct.

37. On or before June 7, 1935, Fritz von Opel placed all but three of the shares of Uebersee Finanz-Korpora-

tion, A. G. in box 1917 at the Schweizerische Kreditanstalt in Zurich and thereafter delivered the key to Dr. Hans Frankenberg.

38. Hans Frankenberg received the key as agent for Wilhelm von Opel and it was delivered to him by Fritz von Opel who understood that Hans Frankenberg represented his father.

39. Hans Frankenberg was made managing director of Uebersee Finanz-Korporation in the spring of 1932 at the request of Wilhelm von Opel, in the form of a suggestion.

40. Thereafter Hans Frankenberg continued to be at all times and still is managing director of Uebersee Finanz-Korporation, and there is abundant evidence
3389 establishing that up to and including 1940 he exercised control over the major policies of the corporation. From 1932 until the date of vesting, Dr. Eugene Meier was President and chief officer of plaintiff corporation. Dr. Meier testified that in the year 1940 plaintiff corporation was without connection with Fritz von Opel or with Hans Frankenberg and that it became necessary for Dr. Meier to have a direct hand in the management of the affairs of the corporation. The Court is not able to find from this testimony the extent to which, if any, Dr. Meier, after 1940, participated in the management of the corporation. The record is bare of evidence that after 1940 Frankenberg exercised control over plaintiff, but the record is also bare of any evidence of a termination of such control. From all of the evidence, including the evidence establishing that Frankenberg did exercise control during the years 1932 to 1940 inclusive, and establishing motive and intent for such exercise of control, and in the absence of any evidence that Frankenberg ceased to exercise such control, the Court draws the inference and finds

as a fact that Frankenberg continued to exercise control over plaintiff corporation until the date of vesting.

41. Hans Frankenberg acted at all relevant times as managing director of Uebersee Finanz-Korporation as agent for Wilhelm von Opel.

42. The delivery of the key constituted valid delivery of possession of the res subject to the usufruct and the usufruct contemplated in the gift of October 5, 1931 there and then came into existence in accordance with the terms of the instrument.

43. Hans Frankenberg, as such agent; from the spring of 1932 until the date of vesting, exercised control over the investments and activities of Uebersee Finanz-Korporation, A. G.

44. Fritz von Opel from time to time, from the spring of 1932 until the date of vesting, engaged in activities in behalf of Uebersee Finanz-Korporation and gave instructions concerning its investments.

45. The activities of Fritz von Opel to a large decree were carried on with the guidance and direction of Wilhelm von Opel, or his agent, Hans Frankenberg.

46. All the vested property, which is the subject of this litigation and which is named in the complaint herein, was, at the date of vesting, owned by Uebersee Finanz-Korporation and had been acquired with funds which had originally been derived from the sale of the 600 shares of Adam Opel, A. G. originally owned by Wilhelm von Opel as hereinbefore found.

47. In March of 1933, Uebersee Finanz-Korporation sought to remove to Switzerland $1,250,000 in gold pieces purchased in New York, but was prevented from doing so by order of an agency of the United States Government.

48. Thereafter, from time to time, until May 25, 1936 when certiorari was denied by the Supreme Court, 3390 Uebersee Finanz-Korporation sought by administrative and judicial means to obtain permission to remove the same gold from the United States.

49. In support of an application for a license to remove the gold an affidavit was filed by Fritz von Opel in which he stated that a usufruct had been created pursuant to the gift agreement of October 5, 1931, that the Uebersee shares had been placed in a safe deposit box and that the key to the box was in the possession of Hans Frankenberg as his father's agent, and he further stated he had bare legal title, plus 20% of the income.

50. This affidavit was a part of the record in later legal proceedings before the United States District Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit, and the Supreme Court of the United States.

51. In 1935 Wilhelm von Opel discussed the waiver of his right to a usufruct but it was never after its creation waived or abandoned by any statement or act of Wilhelm or Marta von Opel.

52. A right of usufruct, once established, is under German law an *in rem* right in property. A person having a usufruct in property has a right:

(a) to the enjoyment of the property or, in the case of money or securities, to the income from the securities;

(b) to co-possession of the property together with the person holding legal title to the property;

(c) to a voice in the management of the property insofar as the maintenance and preservation of the usufructuary's rights under subsection (a) above are concerned;

(d) to prevent the sale or disposition of the property as a result of his right to co-possession;

(e) the German Civil Code does not mention whether the usufructuary, for the protection of his income, has any voting rights. In the absence of a decided case the legal commentaries speculate in three different directions. One position is that the title owner has all voting rights and the usufructuary no voting rights whatsoever. The second position is that the title owner has a voting right for all measures which have nothing to do with income while the usufructuary can vote in regard to income. The third position is that the usufructuary has all the voting rights.

53. Under the laws of Germany at the date of vesting Wilhelm and Marta von Opel had a usufruct in the property and therefore had the usufructuary rights hereinbefore described. Neither Wilhelm nor Marta von Opel ever demanded or received any income of any nature from the usufruct. After the usufructuary agreement was made on October 5, 1931, plaintiff corporation paid the expenses of a trip to South America and a trip to Hungary made by Wilhelm von Opel, said expenses being charged on the books of plaintiff corporation to Fritz von Opel.

54. The gift agreement of October 5, 1931 also provided that if the parents Opel should predecease Fritz von Opel, the gift should be considered an advancement and be deducted from his share in such property as might be inherited by him or his sister, Mrs. Elinor Sachs,
3391 nee von Opel, nor, in case of her prior death, by her issue.

55. The gift agreement also provided that in the event Fritz von Opel predeceased his parents without leaving legitimate issue, the gift would become void. The stocks or the property substituted for the gift including the income accrued but not drawn would under this condition revert to the parents Opel or the surviving parent.

56. Fritz von Opel is now fifty years old and does not have issue. Wilhelm von Opel died in May, 1948. Marta von Opel is now seventy-four years of age. Elinor Sachs, nee von Opel, is now alive.

Conclusions of Law.

1. Plaintiff is a corporation organized under the laws of Switzerland.

2. Plaintiff is indirectly owned and controlled by enemies within the meaning of the Trading with the Enemy Act.

3. Subsequent to the gift agreement of October 5, 1931 between Wilhelm and Marta von Opel and Fritz von Opel, a valid usufruct was created in Wilhelm and Marta von Opel giving them *in rem* rights in the proceeds of the property transferred, and said usufruct existed in Wilhelm and Marta von Opel at the date of vesting.

4. The circumstances of the ownership and control of plaintiff corporation and the assets vested by the Alien Property Custodian constitute enemy taint of plaintiff, and plaintiff is therefore barred from recovery under Sections 2 and 9(a) of the Trading with the Enemy Act, as amended, as interpreted by the Supreme Court of the United States.

5. The circumstances of the acquisition of Fritz von Opel's Liechtenstein citizenship and his attachment to and

sympathy for Germany and plaintiff's ownership of Transdanubia Bauxite, A. G., which mined bauxite for the benefit of Germany are further evidence of enemy taint within the meaning of Section 2 of the Trading with the Enemy Act and taken in conjunction with the finding of ownership and control as aforesaid of the vested securities by Wilhelm and Marta von Opel, alien enemies, bar recovery of said vested securities.

6. Judgment must be rendered in favor of defendant.

/s/ BOLITHA J. LAWS
Chief Judge

May 6, 1949

Judgment
Filed May 6, 1949

3392 This action having come on for trial before me on December 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 1948 and January 3, 4, 5, 6, 7, 10, 11, 13, 19, 24, 25 and 27, March 16 and April 29, 1949, and having heard the evidence adduced and the arguments of counsel, and the Court, after due deliberation, having filed its findings of fact and conclusions of law, NOW THEREFORE, it is

ORDERED, ADJUDGED, and DECREED that plaintiff take nothing, and shall not recover anything in this action, that judgment is hereby entered in favor of the defendant on the merits, that defendant have and recover from plaintiff his costs in this action and that defendant have execution therefor.

Dated, May 6, 1949

/s/ BOLITHA J. LAWS
Chief Judge

Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a New Trial Filed May 11, 1949

3393 The plaintiff herein has filed a motion for a new trial on the basis of allegedly newly discovered evidence, which evidence is in the form of an affidavit by one Eleonore Firnhammer. The defendant opposes this motion upon the following grounds:

1. The purported evidence contained in the affidavit, if offered as testimony, would be inadmissible as hearsay.

2. The moving papers do not establish that the purported evidence is newly discovered.

3. The purported evidence is purely cumulative and corroborative.

4. Plaintiff has failed to exercise due diligence in obtaining this purported evidence and in filing this motion.

5. The purported evidence, even if admissible, is not direct proof of a waiver of the usufruct by Wilhelm and Marta von Opel.

POINT I

The purported evidence contained in the affidavit, if offered as testimony, would be inadmissible as hearsay.

The purported evidence which forms the basis for the motion now before this Court is contained in the affidavit of Eleonore Firnhammer, annexed to the moving papers.

It may be presumed from this affidavit that Mrs. 3394 Firnhammer, if called as a witness, would testify to the statements of Wilhelm von Opel, attributed to him in her affidavit. These statements of Wilhelm von Opel, if presented to the Court in the form of testimony by Mrs. Firnhammer, are clearly hearsay evidence.

In order for the plaintiff to succeed in changing the Court's finding as to waiver in this action, the plaintiff must prove by a preponderance of the evidence that Wilhelm von Opel and Marta von Opel in fact waived their usufruct which they acquired pursuant to the gift agreement of October 5, 1931. The testimony of Mrs. Firnhammer as to statements made by Wilhelm von Opel is only admissible at best to prove the fact that such statements were made and is in no way probative of the truth of those statements or of the fact that a waiver was or was not made. The mere fact that Wilhelm von Opel may or may not have made such statements is not in itself sufficient to prove that Wilhelm von Opel and Marta von Opel in fact waived their usufruct. That such purported evidence as the plaintiff now proffers is hearsay, is shown by V *Wigmore on Evidence* (3rd ed., 1940) section 1361, in which it is said:

> "The only question, then, can be whether this *assertion of B, reported by A,* is admissible as evidence of the event X, asserted by B to have occurred. It is clear that what we are now attempting to do is to *prove event X by B's assertion;* * * * It is these extra-judicial testimonial assertions which the Hearsay rule prohibits.'" (Italic as in original text.)

Adopting Professor Wigmore's statement of the hearsay rule, it is apparent that plaintiff may not prove an event, namely the waiver, by the testimony of Mrs. Firnhammer as to what was said by Wilhelm von Opel. It is, of course, significant in this connection that there is ab-

solutely no testimony in the record of this case by Wilhelm or Marta von Opel that they ever waived their usufruct under the gift agreement.

The purpose of the hearsay rule is, of course, to prevent the admission in evidence of extra-judicial statements of a person who is not before the court, whose demeanor and credibility are not subject to observation by the court, and who is not subject to cross-examination. The plaintiff now seeks to accomplish, by the evidence proffered, the precise result which the hearsay rule is designed to
3395 prohibit. It seeks to place before the Court extra-judicial statements of Wilhelm von Opel, who cannot testify in person and is not subject to cross-examination and who, when he did testify in this action, uttered not one single word about a waiver of his usufruct.

Nor would such testimony be admissible under any of the recognized exceptions to the hearsay rule. Not only is the proffered testimony hearsay, but in addition, it is also subject to the objection that the declarations sought to be proved are purely self-serving. The affidavit of Mrs. Firnhammer states several times that Wilhelm von Opel told her that he was involved in criminal proceedings brought by the German government involving the usufruct which he and his wife held and that "he was afraid that the Nazis might use what he called the niessebrauch provision of the gift agreement to jump on him anew year after year." It is clear from this statement that if Wilhelm von Opel ever made any statements such as are attributed to him by Mrs. Firnhammer, which the defendant does not concede, the only purpose which Wilhelm von Opel could have had in making such statements was to prevent the German authorities from jumping "on him anew year after year," and were not designed to relinquish the property rights which Wilhelm von Opel had. Under these circumstances, the proffered evidence by Mrs. Firnhammer is also inadmissible upon the ground that it is evidence only of self-serving declarations.

The statements allegedly made in August, 1947 by Wilhelm von Opel are further objectionable upon the ground that they were made *pendente lite*. While statements made *ante litem motam* may, under certain circumstances be admissible, statements made during the course of litigation in which the declarant is interested are not admissible and are self-serving. The interest of Wilhelm von Opel, living in post-war Germany, in seeking to assist in securing the return of the vested property from the United States is so apparent that it needs no further elaboration.

The purported evidence contained in the affidavit of Mrs. Firnhammer, if offered as testimony, would there-
3396 fore be inadmissible as hearsay evidence and as evidence of self-serving declarations. In order for plaintiff to prevail upon this motion there must be a showing that the plaintiff has new evidence which was not available at the time of the trial. Evidence which is inadmissible as hearsay and self-serving is, of course, no evidence at all, and, consequently, no ground exists upon which the Court could properly grant this motion for a new trial.

POINT II

The moving papers do not establish that the purported evidence is newly discovered.

Even if it be assumed for the purpose of argument that the testimony of Mrs. Firnhammer would be admissible, which of course defendant does not concede, defendant submits that it has not been established that the evidence proffered is newly discovered within the meaning of Rules 59 and 60(b), of the Rules of Civil Procedure. The courts have held that five requirements must be met by a moving party before a court will exercise its discretion in allowing a new trial on the ground of newly discovered evidence. These requirements are: that the evidence be

discovered after the end of the trial; that facts are alleged which show due diligence in attempting to discover such evidence; that the new evidence is not merely cumulative or corroborative or for the purpose of impeaching; that the evidence is material; and that there is a probability that the evidence, if admitted, would lead to a different result.

Marshall's U. S. Auto Supply Inc. v. *Cashman*, 111 F. (2d) 140 (C. C. A. 10, 1940) cert. den. 311 U. S. 667 (1940);
Prisament v. *United States*, 96 F. (2d) 865 (C. C. A. 5, 1938).

Defendant contends that the first requirement set forth above, namely, that the evidence be newly discovered has not been met. Upon reading Mrs. Firnhammer's affidavit, the Court will note that there is absolutely no statement by her as to when she first reported the alleged statements of Wilhelm von Opel to either Fritz von Opel or
3397 Margot von Opel. This omission might not be so glaring if the moving papers contained an affidavit by either Fritz von Opel or Margot von Opel, or both, as to when these alleged statements were first reported. It is further extremely striking and interesting to note the manner in which plaintiff attempts to show that these alleged statements by Wilhelm von Opel were not known until after the trial of this action. The motion signed by plaintiff's attorneys states that Fritz von Opel, who has had a strained relationship with Mrs. Firnhammer, told plaintiff's attorneys that Margot von Opel had been told of these alleged statements by Mrs. Firnhammer. Thus, the moving papers are in fact based upon a double hearsay assertion by plaintiff's attorneys that Margot von Opel told Fritz von Opel who told plaintiff's counsel of the existence of this purported evidence after the trial. Defendant submits that the Court is entitled to give consid-

erable weight to the manner in which plaintiff seeks to establish that the purported evidence is newly discovered and, particularly, to the absence in the moving papers of any statement of the witness herself as to when she informed the interested parties. Plaintiff seeks to have this Court grant a new trial in an important and involved matter which took several weeks of testimony of witnesses, based upon little more than the hearsay declarations of Fritz von Opel, who, in the light of the Court's findings, must be deemed a witness of at least questionable credibility. Such a showing in defendant's view is hardly sufficient to justify the extraordinary relief which plaintiff seeks.

Defendant, however, does not merely rely on the insufficiency of the moving papers as outlined above. Defendant respectfully calls the Court's attention to the signed statement of Mrs. Firnhammer, annexed hereto as Appendix A, which statement was obtained by a Special Agent of the Federal Bureau of Investigation. In that statement, Mrs. Firnhammer asserts that she came to the United States in November, 1947; that she renewed her acquaintance with Fritz and Margot von Opel during 1948 and saw those persons several times; and that this case was discussed by Fritz and Margot von Opel and others in her presence. She further asserts that, in March
3398 or April, 1949, Fritz von Opel *came to her* and asked her whether she had any knowledge of facts which might make her useful as a witness in this action. She further states, "From the manner in which Fritz von Opel asked me questions, I was aware that he knew that I was aware of the general nature of the case, but he did not know the details of my knowledge of the case." She then made certain statements to Fritz von Opel who prepared the affidavit filed as part of the moving papers. Thus, according to Mrs. Firnhammer, the statement in the moving papers that her knowledge of the case was first discovered in the course of a conversation with

Margot von Opel is not correct. To the contrary, Fritz von Opel sought her out as a possible witness after the Court had rendered its opinion. It is clear from this statement by Mrs. Firnhammer (Appendix A) that Fritz von Opel at least knew that Mrs. Firnhammer did have some knowledge of this case, but he did not attempt to learn the extent of such knowledge until after the Court rendered judgment for defendant. Certainly the plaintiff, or its representative Fritz von Opel, cannot be permitted to proceed to trial on certain evidence and then after the Court has determined that such evidence is insufficient, seek out additional evidence which was available and which was known to be available all the time.

Nor is that all which in defendant's opinion shows a failure to establish that the evidence is newly discovered. The Court's attention is respectfully directed to the second paragraph of Mrs. Firnhammer's affidavit in which she states that over the years she took the place of a daughter, vis-a-vis Wilhelm and Marta von Opel and to her statements in the balance of the affidavit that she saw Wilhelm von Opel repeatedly after 1939 and particularly after the end of the war. Plaintiff now asks this Court to believe that the parties concerned with the prosecution of this action never had any idea that Mrs. Firnhammer, who was on such intimate terms with Wilhelm von Opel, had any knowledge of facts which might be relevant in this controversy. Mrs. Firnhammer states that she saw
3399. Wilhelm von Opel in August, 1947; the record shows that Fritz von Opel was in communication with his father immediately after the end of hostilities in 1945 (Defendant's Exhibit 36); Wilhelm von Opel's deposition was taken in Germany in the first week of September, 1947 and at that time Wilhelm von Opel of course had an opportunity to confer with counsel for the plaintiff. At the same time the deposition of Daniel Gros, who on various occasions had acted as attorney for Wilhelm von Opel, was also taken, and Daniel Gros was subsequently

brought to this country by plaintiff at the beginning of the trial. Yet, according to plaintiff, none of these persons had any idea that Mrs. Firnhammer had any knowledge of facts which might be relevant to this action.

Although plaintiff's attorneys state that Fritz von Opel told them that his relations with Mrs. Firnhammer have been very strained, there is no similar statement with respect to Margot von Opel, his wife, and it is apparent that no strained relations existed with respect to Margot von Opel. Yet, here again, the Court is asked to believe that Margot von Opel, who as late as 1946 was well aware of the difficulties which this usufruct was creating and might create with respect to this very case (R. 2518-2522), never had any idea that Mrs. Firnhammer knew anything about this matter and never reported it to Fritz von Opel or his attorneys, who are also the attorneys for the plaintiff in this action.

On the basis of the foregoing, defendant submits that the plaintiff has wholly failed to establish that the evidence is newly discovered or could not reasonably have been discovered prior to the conclusion of the trial of this action. Having failed to establish that the evidence is newly discovered, the motion should be denied.

POINT III

The purported evidence is purely cumulative and corroborative.

In Point II, *supra*, there has been set forth the five requirements which must be met before a court will exercise its discretion to grant a new trial. The third
3400 of these requirements is that the alleged new evidence is not merely cumulative or corroborative. This requirement has likewise not been met on the instant motion.

The purported evidence proffered by the plaintiff relates solely and exclusively to the issue as to whether Wilhelm

von Opel in fact waived the usufruct which he acquired pursuant to the gift agreement of October 5, 1931. This is not a new issue in this case. On the contrary, it has been one of the most important issues since the beginning of the trial, and the Court specifically requested counsel to discuss this point in their final arguments. On this issue, the plaintiff adduced testimony by Fritz von Opel and by Daniel Gros which sought to show that the usufruct had been waived. The defendant adduced testimony of J. Mason Houghland, Butler P. Crittenden and Rudolf Deku with respect to certain admissions by Wilhelm von Opel and Fritz von Opel which were totally inconsistent with the waiver of a usufruct. In addition, there was received in evidence Defendant's Exhibit 25, a letter from Fritz von Opel to his father, dated December 21, 1936, in which Fritz states that he had been discussing the usufruct for several days and that he had learned that Wilhelm von Opel had been discussing the usufruct with Dr. Frankenberg.

The purported new evidence which forms the basis of plaintiff's motion is nothing more, if admissible at all, than additional testimony on the same issue which has been fully litigated and is therefore merely cumulative and corroborative of testimony previously offered by the plaintiff. It is well settled that a motion for a new trial may not be granted for the purpose of admitting such cumulative and corroborative evidence.

F. W. Woolworth Co. v. *Seckinger*, 125 F. (2d) 97 (C. C. A. 5, 1942);
Prisament v. *United States*, 96 F. (2d) 865 (C. C. A. 5, 1938).

In the *Woolworth* case, *supra*, one of the issues on trial below was the identity of the shoes worn by the plaintiff at the time of the accident. After judgment for plaintiff, defendant moved for a new trial on the ground of

3401 newly discovered evidence. The evidence offered by this motion concerned the identity of the shoes worn by the plaintiff at the time of the accident. The identity of the shoes was one of the major issues at the trial. The motion was denied and on appeal the court held that the denial of the motion was proper and said, at p. 98:

> "One of the principal issues in the case concerned the identity of the shoes Mrs. Seckinger was wearing when the accident occurred. The evidence offered in support of the motion for a new trial likewise dealt with this issue. Construed to its best advantage for the movants, it is clear that this was corroborative of earlier witnesses and designed to impeach the testimony of the plaintiffs. It is well settled that motions for a new trial on the ground of newly discovered evidence must do more than merely seek to relitigate old issues, and cannot be allowed where the new evidence is merely for the purpose of corroboration or impeachment."

In the *Prisament* case, *supra*, a criminal prosecution, a motion for a new trial was filed after judgment on the basis of newly discovered evidence that the defendants had been seen in New York at the time of the robbery in Georgia. The presence of the defendants in New York at the time of the offense had been testified to at the trial through several witnesses. The court denied the motion for a new trial upon the ground that additional evidence tending to show that the defendants were in New York at the time of the robbery was merely cumulative and its denial was sustained on appeal.

The evidence here offered falls precisely within the rule stated in the cases cited. The purported evidence is merely cumulative and corroborative on an issue on which there has been an abundance of testimony and the motion seeks only to "relitigate old issues." Plaintiff recognizes that it must show that the new evidence proffered is not merely

cumulative or corroborative. It seeks to meet this burden, however, by a mere statement of a conclusion to that effect. This is wholly insufficient. Plaintiff also seeks to meet this burden by stating that the alleged new evidence contradicts Finding of Fact No. 51. This on its face shows that plaintiff is merely attempting to "relitigate old issues."

On the basis of the authorities cited, therefore, 3402 even if the testimony of Mrs. Firnhammer were admissible, there would be no proper ground for granting a motion for a new trial and the motion should be denied.

POINT IV

Plaintiff has failed to exercise due diligence in obtaining this purported evidence and in filing this motion.

Of the five requirements which must be met for the granting of a motion for a new trial, stated in Point II, *supra*, the second is that facts must be alleged that show the exercise of due diligence in seeking to discover such evidence. Defendant submits that even if the evidence were admissible there has been no showing of due diligence in seeking to discover the evidence.

The statement of Mrs. Firnhammer, annexed hereto (Appendix A) shows that she had discussed this case with Wilhelm von Opel in Europe as late as 1947, and that this case was discussed in her presence by Fritz and Margot von Opel in 1948. Her statement further shows that immediately after the Court had filed its opinion awarding judgment to the defendant, Fritz von Opel went to Mrs. Firnhammer and asked her whether she had knowledge of any facts which might be relevant. It is thus apparent that Fritz von Opel at least knew all along or had an idea that Mrs. Firnhammer might have knowledge of circumstances which could be relevant in this

matter. Whether or not he advised counsel of the existence of this witness is not stated, but certainly he, who to say the least has a substantial interest in this controversy, cannot now be permitted on behalf of the plaintiff to seek to bolster the case after the cause has been lost. These facts certainly demonstrate that there has been no showing of due diligence to discover material evidence.

The defendant, however, does not rely on these facts alone. The Court is respectfully referred to the statements under Point II appearing on pages 6 and 7 of this memorandum which will be restated briefly here. In the affidavit made a part of the moving papers, Mrs. Firnhammer states that she took the place of Wilhelm von Opel's daughter and that she saw him repeatedly in the 1930's
3403 and after the end of the war. Her affidavit itself discloses that there were discussions with Wilhelm von Opel concerning the usufruct. Fritz von Opel was frequently in Germany before the war and in fact was there almost every year. He was also in communication with his father after the end of hostilities in 1945. Wilhelm von Opel's deposition was taken in September, 1947, and counsel for the plaintiff were, of course, present. In the light of all these facts, the Court is now asked to find that neither the plaintiff or its representatives, nor Wilhelm nor Fritz von Opel, nor plaintiff's counsel, had any idea that Mrs. Firnhammer might be used as a witness in this matter.

Whether or not they were actually aware of Mrs. Firnhammer's knowledge in this action is of course immaterial; the issue on this motion is whether by the exercise of due diligence they should have known of this purported evidence. The exercise of due diligence requires that every effort be made to discover available evidence. To say that in the course of preparation for trial neither plaintiff nor its counsel could, by the exercise of due diligence, have discovered this purported evidence taxes credulity. The plaintiff and its representatives and counsel cannot sit

back and ignore the plain facts which are apparent, including the close relationship between Wilhelm von Opel and Mrs. Firnhammer, and then say that due diligence would not have resulted in the discovery of this evidence. It is incumbent upon parties to litigation and their counsel to explore all possibilities of obtaining evidence and to question all persons who might conceivably have knowledge of the facts. This would certainly include a person sufficiently intimate with Wilhelm von Opel to take the place of his daughter in his affections.

It is particularly significant in this connection to note the statement of the Court on March 16, 1949 when advised of the intention to file this motion on newly discovered evidence. The Court said to counsel for the plaintiff (R. 3178), "You had better labor pretty hard as to why you could not get it before you tried the case." It is apparent that the Court was well aware of the heavy burden of due diligence imposed upon a person seeking a new trial.

3404 There is a further lack of due diligence present here, namely, the failure of plaintiff to use due diligence in filing this motion. The Court's Opinion was filed on February 21, 1949. At that time the Court issued tentative Findings of Fact and Conclusions of Law. On March 16, 1949 a hearing was held before this Court with respect to amendments requested by the plaintiff with respect to such findings and conclusions. During that hearing, at two separate points in the record, Mr. Gallagher, of counsel for the plaintiff, stated to the Court that he was going to file a motion for a new trial on the basis of newly discovered evidence (R. pages 3164, 3178). Obviously, Mr. Gallagher at that time had an idea as to what the newly discovered evidence was, and in fact he stated that he was not yet prepared to file a motion because he did not have the necessary affidavit. Subsequently, on April 29, 1949, a further hearing was held with respect to proposed amendments of the findings and conclusions

and the Opinion of the Court. At this hearing, no one on behalf of plaintiff made any statement to the Court of an intention to file a motion for a new trial. At the conclusion of this last hearing, the findings, conclusions and opinion were finally settled, counsel for the defendant was instructed to have the necessary documents rewritten and the Court stated (R. 3245), "We can try to get it out next week, about Wednesday.", meaning May 4, 1949. Finally, on May 5, 1949 the instant motion was served and filed.

It thus appears that counsel for the plaintiff knew of the existence of this purported evidence at least on March 16, 1949, and yet they permitted more than seven weeks to elapse before filing such a motion. Certainly, a party moving for a new trial has a duty to the Court to file such a motion as soon as the evidence is known. It could hardly have taken seven weeks to obtain an affidavit from a witness who states she is employed in New York City and to prepare a two page motion to accompany such affidavit. This motion for a new trial is addressed to the discretion of the Court. It would seem that the Court should not reasonably be expected to exercise its discretion in
3405 favor of a party who has not exercised due diligence and reasonable speed in bringing allegedly new evidence to the attention of the Court.

On the basis of all of these facts, plaintiff has wholly failed to show that the evidence could not have been discovered with the exercise of due diligence or that in filing this motion they exercised due diligence. For these reasons the motion should be denied.

POINT V

The purported evidence, even if admissible, is not direct proof of a waiver of the usufruct by Wilhelm and Marta von Opel.

The fifth requirement, set forth in Point II, *supra*, which must be met for the granting of a motion for a new trial is that there is a probability that the evidence if admitted would lead to a different result. The purported evidence submitted by the plaintiff, if it were admissible in this action, does not meet this requirement.

First, any evidence as to a waiver of the usufruct by Wilhelm von Opel given by Mrs. Firnhammer is subject to two deficiencies. The testimony in the record of this action shows that even if Wilhelm von Opel and Marta von Opel had sought to waive their usufruct, the usufruct was a right to foreign exchange, the waiver of which required a license under the German foreign exchange laws. Those laws further provided that the absence of such a license rendered any transaction subject thereto null and void. Plaintiff has offered no proof that a license was ever obtained from the foreign exchange authorities, and consequently, the Court would be constrained to hold that a valid waiver was never made.

The second deficiency is that the affidavit of Mrs. Firnhammer deals only with alleged declarations of Wilhelm von Opel. Nowhere in her affidavit is it stated that she knows of any declarations by Marta von Opel, the wife of Wilhelm von Opel. The Court will recall that the evidence established that the gift agreement related to a gift of property held as community property by Wilhelm and Marta von Opel, and that the usufruct ran to both Wilhelm and Marta von Opel. Therefore, the testimony by
3406 Mrs. Firnhammer as to declarations by Wilhelm von Opel would not dispose of the usufruct, since even on the basis of this motion, there is no new evidence that

Marta von Opel ever made any attempt to waive, or made any declarations concerning, a waiver of the usufruct. Consequently, the purported evidence is totally insufficient and could not lead to a different result in this action.

Second, an examination of Mrs. Firnhammer's affidavit attached to the moving papers, discloses that nowhere does she state that Wilhelm von Opel ever said that he had waived the usufruct. The first alleged conversation is said to have taken place in 1934 or 1935 and that Wilhelm von Opel at that time said that "he didn't need, nor desire, any income from his son." This is not a statement of waiver. It is further significant to note that this statement is followed by a further purported declaration of Wilhelm von Opel that the purpose of the usufruct had been "to educate his newly married son to live well within his means." This last alleged declaration clearly shows that Wilhelm von Opel intended to and did retain legal control over the property and the actions of his son relating thereto. The next alleged declaration of Wilhelm von Opel is stated to have been made in the summer of 1937 at which time Wilhelm told Mrs. Firnhammer that "his lawyer had succeeded in bringing his negotiations with the German authorities to a favorable conclusion." This statement may be entirely disregarded since it in nowise indicates what negotiations with the German authorities were being discussed and is certainly no proof that a usufruct was waived, in view of the fact the usufruct is not even mentioned. The Court will recall that this record contains several instances in which Wilhelm von Opel was involved with the German authorities, and it can hardly be determined to what this alleged statement refers.

The last alleged statement contained in Mrs. Firnhammer's affidavit is a purported statement by Wilhelm von Opel in August, 1947 at which time he is supposed to have said that the German authorities had recognized that he had abandoned all claims against his son. This

3407 again is no proof of a waiver of the usufruct for again neither "waiver" nor "usufruct" are mentioned. Furthermore, this alleged statement, if it was in truth made, would be entitled to no weight whatsoever and could not change the result of this action, since less than a month thereafter Wilhelm von Opel testified in this action by deposition, at which time he made no statement whatsoever that he had ever waived a usufruct. Certainly, Wilhelm von Opel's own testimony under oath is the best evidence of what he did or did not do, and his failure to state in his deposition that he had ever waived his usufruct must necessarily be deemed controlling.

In any event, even if the reported statements of Wilhelm von Opel were made, there is no declaration imputed to him that he had in fact waived his usufruct. Consequently, since there is no direct proof of a waiver in the affidavit and since there is a complete failure of proof as to any waiver by Marta von Opel or as to any license from the German foreign exchange authorities approving such waiver, the testimony of Mrs. Firnhammer, even if it could be admitted in evidence, could not lead to a change in the result of this action. Plaintiff has therefore failed to meet this requirement for a motion for a new trial and the motion should be denied.

Conclusion

On the basis of the foregoing, it has been demonstrated that the alleged newly discovered evidence is not evidence at all since it is inadmissible as hearsay and self-serving. Further, even if the evidence could be deemed admissible, the plaintiff has wholly failed to fulfill the requirements prerequisite for the granting of a motion for a new trial in that the evidence is not newly discovered; the evidence is merely cumulative or corroborative; no facts are alleged which show due diligence in attempting to discover this

evidence or in filing this motion; and there is no probability that the evidence, if admissible, would lead
3408 to a different result. Upon all these grounds, therefore, defendant respectfully requests that the motion be denied in all respects.

Respectfully submitted,

Dated, May 11, 1949

/s/ DAVID L. BAZELON

David L. Bazelon
Assistant Attorney General

/s/ MYRON C. BAUM

Myron C. Baum
Attorney

/s/ E. ERNEST GOLDSTEIN

E. Ernest Goldstein
Attorney

Attorneys for Defendant
Office of Alien Property
Department of Justice

New York, New York
May 9, 1949

I, Eleonore Dorothea Firnhammer-Hoch, make the following voluntary statement to Harry Kiefer and Michael T. Geary who have identified themselves to me as Special Agents of the Federal Bureau of Investigation. No threats or promises have been made to me and I realize that I have the right to consult an attorney prior to making this statement. I also realize that I do not have to make any statement and that it can be used in a court of law against me and/or others. (E. F.-H.)

I came to the United States on or about November 10, 1947 and entered through the Port of New York.

While I was in Europe, I learned from Geheimrat Wilhelm Von Opel that his son Fritz was involved in a court case in the United States.

About December, 1947, I met Fritz and Margot Von Opel at their home in New York City. This was entirely a social visit. The court case was not discussed.

Thereafter in the spring of 1948, I met Fritz Von Opel (E. F.-H.) on a few occasions. I also met Margot Von Opel late in 1948 when she returned from Switzerland. During these meetings, the court case was mentioned by some of the people present but I never discussed it with either Fritz or Margot Von Opel. They were not interested in my opinion because they thought it was too complicated for me to understand.

About the end of February, 1949, I learned that Fritz Von Opel had lost his court case. I learned this from Margot Von Opel.

In March or April, 1949, Fritz Von Opel called me and asked to see me. I had not seen Fritz for nearly a year. He asked me to come to his apartment in order to speak to me about several things.

At first there was some family conversation. Then Fritz asked me about what his father had said to me in detail. He said that perhaps he could use me as a witness but wasn't sure.

From the manner in which Fritz Von Opel asked me questions, I was aware that he knew that I was aware of the general nature of the case, but he did not know the details of my knowledge of the case.

I then told Fritz Von Opel what I knew about the case. He took notes during the conversation. Sometime later, Fritz Von Opel telephoned me and asked me to come to his place of residence. Fritz Von Opel gave me a typewritten affidavit to read. I would have preferred to typewrite my own affidavit but because I am an inefficient typist and have no typewriter, we had decided that Fritz Von Opel was to have the affidavit prepared elsewhere.

I read the affidavit which Fritz Von Opel gave me. I returned it to Fritz Von Opel and told him that it was correct. At Fritz Von Opel's suggestion we went to a Notary Public, where I signed the affidavit. Fritz Von Opel then took my affidavit with him.

3410 I have read the above statement consisting of this page and one other page. I now sign this statement to indicate that it is true.

(signed) Eleonore Dorothea Fernhammer-Hoch

Witnessed: Harry Kiefer, Special Agent, FBI, NYC 5-9-49

Michael T. Geary, Special Agent, FBI, NYC 5-9-49

Plaintiff's Memorandum of Points and Authorities and Additional Affidavits in Support of Plaintiff's Motion for a New Trial, Filed May 23, 1949

The defendant herein has opposed the motion hereinbefore filed by the plaintiff for a new trial on the ground of newly discovered evidence and predicates its opposition on several grounds. In answer thereto and for the convenience of the Court, plaintiff will answer the defenses raised by the defendant in the order in which they are set forth in its memorandum.

1. The purported evidence contained in the affidavit of Eleanore Firnhammer, if offered as testimony, is admissible as an exception to the hearsay rule. This exception provides that declarations of deceased persons made while the declarants were in a position to know of the matters stated and which are against pecuniary or proprietary interest are admissible. This rule of law is so well recognized that it needs little if any citation. Case books are replete with statements of the courts supporting this principle. The most pertinent qualification is that the declarant be deceased at the time the statements made by the declarant are to be introduced. In the present matter, as the court well knows, Wilhelm von Opel died in the Spring of 1948, prior to this trial. A further requisite is that statements be made prior to a time when there was any contemplation that they would be subsequently used as evidence. Statements such as Miss Firnhammer's affidavit discloses were made during the middle 30's, particularly in the years 1934, 1935 and 1937, long prior to any time when it was contemplated that the Trading with the Enemy Act would again come into effect by virtue of a war between Germany and the United States. The statements made by Wilhelm von Opel were definitely against his pecuniary and pro-

3412 prietary interests in that Miss Firnhammer states that he considered all claims which he might have had against his son, Fritz von Opel, were gone. For the convenience of the Court, for a very clear enunciation of the rule that testimony of the type contained in Miss Firnhammer's affidavit is admissible as an exception to the hearsay rule, the Court's attention is directed to *McKelvey on Evidence*, 5th Ed., Sections 251 to 259.

2. The moving papers do establish that the purported evidence is newly discovered. Contrary to the statements of the defendant that in Miss Firnhammer's affidavit there is no statement from her as to when she first reported the alleged statement of Wilhelm von Opel to either Fritz or Margot von Opel, the Court's attention is directed to the affidavit of Miss Firnhammer taken on May 9, 1949 by agents of the Federal Bureau of Investigation and attached to Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a New Trial and marked Appendix A. It is quite clear from a reading of that affidavit that the first time she told any one about her knowledge of the case was subsequent to February, 1949. Plaintiff submits that the defendant is straining the language of Miss Firnhammer's affidavits to endeavor to draw its conclusion that there is nothing to indicate when her statements with respect to her knowledge of the facts of waiver were first brought to the attention of Fritz or Margot von Opel.

3. The testimony sought to be introduced is not purely cumulative and corroborative. The testimony sought to be introduced is, as set forth under point 1, supra, a declaration against interest by Wilhelm von Opel. The witness is a party who has no interest in the proceeding, whose testimony it is submitted must be given serious consideration. It is particularly important in the light of the fact that the court has stated in its opinion that there was no act or statement by Wilhelm von Opel to support a finding that a

waiver had in fact taken place. While the testimony
3413 in some respects is cumulative it is nevertheless submitted that this court in the exercise of its discretion can consider such testimony, for when added to the testimony of Dr. Daniel Gros and the testimony of Director Wilhelm of the Reichbank and also plaintiff's exhibits 96, 97, 98, 99 and 101 it would constitute a preponderance of evidence in favor of a conclusion that a waiver had in fact been made. It would accordingly lead to a different result on that basis and plaintiff requests the court to hear such testimony.

4. Plaintiff has exercised due diligence in obtaining the testimony of Miss Firnhammer. Counsel for the plaintiff, Mr. Walter E. Gallagher, has filed herewith an affidavit setting forth the fact that it was only recently that Miss Firnhammer's evidence or the nature of her testimony was brought to his attention and contrary to the defendant's inference this is not the witness whose testimony was being considered when Mr. Gallagher stated to the Court in March that he intended to file a motion for a new trial predicated on newly discovered evidence. This Court is well aware of the norm in business and personal relationships and that when there are strained family circumstances, such circumstances pose tremendous difficulties even in ordinary situations let alone when exercising due diligence in seeking evidence. This is very politely put by Miss Firnhammer when she states in reference to Fritz and Margot von Opel (Appendix A) "They were not interested in my statement because they thought it was too complicated for me to understand." It is further submitted that prior to and during the time of the trial the documents, plaintiff's Exhibits 96, 97, 98, 99 and 101, together with the testimony of Director Wilhelm and Dr. Daniel Gros concerning said documents, would lead counsel and it is submitted any other party exercising due diligence to the conclusion that a waiver had been clearly shown and no other evidence would

be needed. However, the Court having apparently, because of other circumstances, some doubt in this regard,
3414 found to the contrary. It is believed that the testimony of Miss Firnhammer would dispel any doubts in the Court's mind and affirm the testimony hereinbefore elicited thereby adding up to a preponderance of evidence for the plaintiff on this issue.

5. The proposed evidence is direct proof of a waiver by Wilhelm or Marta von Opel. Under the converse of this point the defendant breaks down its argument into two points: 1. That a license was required under German law. Without arguing this point again, inasmuch as the plaintiff through its experts has shown to the contrary, it is suggested that if the Court were to grant the motion for a new trial and arrived at a finding that a waiver had in fact been made, it would then be apropos for the Court to hear further from plaintiff's and defendant's experts with regard to the applicability of Swiss law and not German law to this situation. 2. That the affidavit of Miss Firnhammer relates only to the declarations of Wilhelm von Opel and not Marta. This Court is well aware of the fact, as evidenced by all of the testimony appearing in this case, that Wilhelm von Opel was the party making all of the decisions for both he and his wife Marta even though they held property on a community basis. In this respect, however, it is suggested to the Court that in addition, if it grants plaintiff's motion for a new trial for the purpose of taking the testimony of Miss Firnhammer, that the Court hear the testimony of Marta von Opel with respect to this waiver. The defendant's endeavor to distort Miss Firnhammer's affidavit on the ground that Wilhelm von Opel had several matters with the German Government is hardly worthy of comment. A reading of her affidavit clearly shows that the problem Wilhelm von Opel was discussing with her was the problem of the niessbrauch and that is the reason he had retained an attorney, Dr. Gros, and it was Dr. Gros who had succeeded in bringing negotiations with the German

authorities to a favorable conclusion, namely affirmation of his position that he no longer had any claim against his son. The defendant further endeavors to make a point of the fact that at the time his deposition was taken
3415 Wilhelm von Opel was not questioned with respect to the waiver of the usufruct. The Court will recall that Mr. Burling endeavored to make much of this point during argument and went so far as to deliberately state that the entire story was made up by Fritz von Opel shortly before the trial. The absurdity of that statement and the failure of counsel for the defendant to thoroughly question Wilhelm von Opel as to any phases of this case as to which they took a different position from the plaintiff and now seek to place the burden of their shortcomings on the plaintiff is clearly manifest from a reading of the affidavits of Dr. Heinrich Kronstein and Mr. Richard J. Connor, which are attached hereto and which contain therein excerpts from statements of Fritz von Opel and Dr. Hans Frankenberg taken under oath by the Alien Property Custodian during 1946, long prior to the taking of the depositions in Wiesbaden.

Conclusion

On the basis of all the foregoing, it is submitted that this Court acting in equity should exercise its discretion and grant the plaintiff's motion for a new trial, hear the testimony of Miss Firnhammer and if the Court so desires, the testimony of Marta von Opel and thereafter, if the Court feels the plaintiff has by a preponderance of evidence shown a waiver, hear further testimony from the experts with respect to the applicability of foreign law, namely Swiss, to this issue.

Walter E. Gallagher

Christopher T. Boland

Attorneys for Plaintiff

CITY OF WASHINGTON,
3416 DISTRICT OF COLUMBIA, *ss.*:

AFFIDAVIT

I, WALTER E. GALLAGHER, having been first duly sworn do on oath depose and say:

In Point 4 of the Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a New Trial, the defendant page 12 of said memorandum makes reference to a statement that I made to the Court at pages 3164, 3178, to the effect that I intended to file a motion for new trial on the ground of newly discovered evidence. The defendant infers from this statement that the evidence to which I referred was the testimony of Eleonore Firnhammer-Hoch whose affidavit was filed in support of our Motion for New Trial.

I state quite categorically that this witness and her testimony is not the newly discovered evidence to which I made reference during the course of my previous appearances in this matter. That testimony was testimony of an entirely different person. After investigation I concluded that the evidence to be elicited would not add any material element to the plaintiff's proof and accordingly determined not to use this testimony as a predicate for a motion for new trial.

The existence of Miss Firnhammer-Hoch and the nature of her testimony was not brought to my attention until very recently, and as soon as I had an opportunity to check into the contents of that testimony I requested that an affidavit be obtained from her and filed it with this court in support of our Motion for New Trial, acting with full diligence to the best of my ability.

Accordingly, I wish to point out that the inference
3417 that the Defendant endeavors to draw as to laches on my part with respect to this witness' testimony is completely unfounded.

(Signed) WALTER E. GALLAGHER

WALTER E. GALLAGHER

CITY OF WASHINGTON,
3418 DISTRICT OF COLUMBIA, ss.:

AFFIDAVIT

I, RICHARD J. CONNOR, having been first duly sworn do on oath depose and say:

As an associate of the law offices of Gallagher, Osheroff, Connor and Butler, 821 Fifteenth Street, N. W., Washington, D. C., I have acted as attorney for the Uebersee Finanz-Korporation, A. G., since the year 1945. In 1946, in cooperation with the office of the Alien Property Custodian, I agreed to the taking of the testimony of Mr. Fritz von Opel under oath in New York City on October 17, 1946 without the formality of subpoena or deposition provided for.

At that time during the course of the taking of the testimony of said Fritz von Opel and one Dr. Hans Frankenberg, the following testimony was elicited:

By Mr. von Opel—pages 56-60 of official transcript:

"Q. Well, as I understand it, according to your view, your father retained nothing. Why didn't he just give you the shares outright, rather than have this agreement? A. He wanted, so to say, protection in case, if he would get what we call—How do you say it?—if he would become destitute, he then wanted a legal claim on me.

Q. Now, however, as you point out, he actually had no claim because he had not pursued his rights under the agreement? A. Yes, sir; there never was any "niessbrauch" established. All my father had was a claim against me personally; and this claim he renounced in the middle thirties.

Q. Can you fix it any better than that; that is, as to the year? A. In 1935 I offered my father to establish

the "niessbrauch" right. That would have meant that I had to transfer to him the 100 shares of Uebersee stock, and also, my claim against the Uebersee amounting to about 11,000,000 Swiss francs.

My father refused to have anything to do with it for various reasons, the main reason being that there was a very strict Foreign Exchange Law in Germany, and my father thought he should not have any dealings under those Foreign Exchange Regulations.

3419 The breach of some of them was punishable by death.

It was a very strict and ruthlessly-enforced law. That is the reason that he gave up not only the "niessbrauch", which he never possessed, but also any claim he might have had against me.

Q. Now, did he ever write to you outlining this release? A. He went even further than that; he went to the German Government.

Q. Now, do you know which particular Department? A. Oh, yes, sir.

Q. All right. A. He first wrote to the local branch of the Foreign Exchange Control Office in Wiesbaden.

Mr. Worthington: Was it Devisen-Stelle?

The Witness: Yes; a branch of the Devisen-Stelle. I think it was called the Collector of Internal Revenue who was in charge of those local offices.

By Mr. Looney:

Q. Was he located in Frankfort, or Wiesbaden? A. Wiesbaden; from there his request was given to the superiors in Kassel.

From there it was forwarded to the highest authority in Berlin, a man by the name of Reichbank Direktor Wilhelm.

Q. Do you know his first name? Wilhelm's first name? A. No; Wilhelm was his last name.

Q. Do you happen to know the address, by any chance? A. No, sir. He was the head of the Reichbank in Berlin or let us rather say, he was head of the Foreign Exchange Division of the Reichbank. They had several Direktors.

Q. What happened when it got there? A. They, after long and thorough discussion, admitted to my father's lawyer that no "niessbrauch" existed; that my father had no claim against me, but that he had a patriotic duty to get Foreign Exchange for Germany and that they would put him under so-called "political pressure".

Q. Who was your father's lawyer at that time? A. My father's lawyer at the time was Dr. Daniel Gros.

Q. Do you know where he resided, or where he had his office in Berlin? A. His office was in Berlin. It was Budapest Strasse. I guess it was 35, if I remember
3420 correctly.

Q. Do you happen to know his home address? Sometimes they are bombed out and you might find one and not the other. A. He is now living in Wiesbaden, Germany, in the American Zone. He left Berlin.

Q. Did you participate in any of these conferences with the Reichbank? A. No; I only was, of course, in touch with Dr. Gros.

Q. Now, what happened after they suggested to your father that he would produce some foreign exchange. A. They applied political pressure to the person of the local Gauleiter Strenger, in Frankfort.

Q. Do you happen to know his first name? A. No, sir.

Q. Some of them we still have in custody. A. I hope so.

Anyhow, Dr. Gros and I anticipated such moves, and to delay any action, I had offered to have a public accountant firm, like Haskins & Sells, check into my financial situation.

I was sure I had no liquid assets, but the obligations; but I tried to forestall any tough actions by way of the local Gauleiter. But the Reichbank did not accept the offer, and nothing came out of it.

Q. Now this letter which your father wrote, which originated at Wiesbaden, did he ever receive any answer from the Reichbank. A. Dr. Gros was ordered to appear in Dr. Wilhelm's office in the summer of 1937; and there Mr. Wilhelm told him that they had no legal rights, but that they would apply political pressure. They did not give that in writing to Dr. Gros, but Dr. Gros in turn, confirmed the contents of the discussion in a letter to Mr. Wilhelm.

Q. Did anything further happen after that, in connection with this request? A. No.

Q. Did your father ever have to pay anything to the Reichbank? A. No; they were after foreign exchange. My father had no foreign exchange, and he could not pay and he did not pay anything."

By Dr. Frankenberg, pages 41 to 43 of official tran-
3421 script:

Q. And you say that somebody imposed a fine on Wilhelm because of his interest in the usufruct, just so much as you remember of it? A. I do not know whether the fine was in connection with the usufruct, or much more with the fact that the Nazis minded very much that he turned over such a large amount of foreign funds to his son; and they wanted him to recuperate part of it, or whatever it was, or to cause or induce his son to give some part of it back, or something like that. That I would not remember; but Fritz would remember that better than I, I guess. What I do know is finally he received the permission of the Reichbank to renounce

the gift, this usufruct agreement; and that was very hard to get, and he got it.

Q. Now, do you know, would that Reichbank be some special branch? A. At Berlin.

Q. At Berlin? A. In charge was—Fritz tried to trace it already—in charge was Mr. Wilhelm of the Reichbank.

Q. Mr. Wilhelm? A. Wilhelm, who unfortunately died. But furthermore, there was in charge his lawyer, who still is alive, and who can testify to this effect.

Q. Who is that? A. That is Mr. Daniel Gros.

Q. Where does Mr. Daniel Gros live, as you knew it last? A. I think he is in Berlin.

Q. In Berlin? A. Yes.

Q. You think I will be able to locate all these people after I get over there. A. Sure.

Q. But if I know the names and the people and the events, it is much easier to find them? A. I am sure everybody will be delighted if you could do so.

Q. So that the records of the Reichbank in Berlin for 1936 should reflect this transaction. A. It was not any transaction, I mean, you see, they just gave an opinion I would say, an opinion to the effect that he has no—they permitted him to state that he has no income out of the gift agreement whatsoever, and so on and so forth.

Q. Now, in order to get that, he had to pay some-
3422 body something? A. Well, maybe it has to have been done in this particular instance. That I do not recall. But anyhow, I think this man Gros, he can produce some facts regarding negotiations with the Reichbank.

Q. Do you remember his first name—Mr. Wilhelm? A. No, Wilhelm is the last name of the Reichbank man who died.

Q. Daniel? A. Daniel Gros.

Q. Have you any idea where he lives, or his place of business? A. Fritz will know that."

The portions of the statements taken on October 17, 1946 by the Office of the Alien Property Custodian which are set forth above show clearly that the Department of Justice was on full notice that the Uebersee Finanz-Korporation would take the position that Wilhelm and Marta von Opel had waived and terminated all of their rights in connection with a certain gift agreement dated October 5, 1931 between Wilhelm and Marta von Opel on the one hand and Fritz von Opel their son, on the other.

During the course of the taking of the depositions at Wiesbaden, Germany in September, 1947 Dr. Daniel Gros, an attorney representing Mr. Wilhelm von Opel, testified in connection with the waiver of Wilhelm and Marta von Opel of their interest in the proceeds of the gift of October 5, 1931. Dr. Gros testified concerning Plaintiff's Exhibits Nos. 96, 97, 98, 99, 100, 101. These exhibits clearly establish the steps taken by Wilhelm and Marta von Opel through their attorney Dr. Daniel Gros to effectuate a waiver of their interest in the proceeds of the gift. Depositions of Wilhelm and Marta von Opel, among others, were also taken in Wiesbaden on or about September 5, 1947. I believe Wilhelm von Opel was present at all times during the taking of depositions in Wiesbaden in connection with the present case. The Department of Justice was represented by Mr. Myron C. Baum and Mr. Joseph Laufer who cross-examined both Wilhelm and Marta von Opel as well as Dr. Daniel Gros.

The circumstances and conditions under which the
3423 Wiesbaden depositions were taken were extremely difficult from the standpoint of accommodations, transportation, court reporting, etc. Many documents were identified during the course of these depositions. I did not believe it necessary to review the testimony of Mr. Fritz von Opel or Dr. Hans Frankenberg for there was no doubt

in my mind as counsel, that the Government had been clearly apprised of the fact that a renunciation or waiver of all the rights of Wilhelm and Marta von Opel was an issue which would be raised by Uebersee in the trial of the matter. The Department of Justice representatives had ample opportunity to interrogate both Wilhelm and Marta von Opel in this respect. If there was any doubt in their minds as to the facts set forth in the transcript of September, 1946 hereinbefore referred to or as to the facts set forth in Plaintiff's Exhibits 96, 97, 98, 99, 100, 101, either Mr. Laufer or Mr. Baum had ample opportunity to interrogate Wilhelm or Marta von Opel. Both parties were available at all times for such interrogation and as previously stated I believe Mr. Wilhelm von Opel was present at all times during the taking of the testimony in Wiesbaden. I know that Wilhelm von Opel was present during the taking of the testimony of Dr. Gros with respect to Exhibits 96 through 101 above mentioned.

(Signed) RICHARD J. CONNOR

RICHARD J. CONNOR

3424 CITY OF WASHINGTON,
DISTRICT OF COLUMBIA, *ss.*:

AFFIDAVIT

I, Dr. Heinrich Kronstein, having been first duly sworn do on oath depose and say:

I was retained by the Uebersee Finanz-Korporation, A. G. in the year 1947 to serve as an interpreter, translator and German law expert. As part of my services I traveled to Germany in the company of Mr. Richard J. Connor, Counsel for the Uebersee Finanz-Korporation, A. G., and participated in the taking of depositions in Wiesbaden, Germany on September 5, 1947, et seq.

Prior to my trip in the company of Mr. Connor to Germany, statements had been taken under oath by the Office of the Alien Property Custodian from Mr. Fritz von Opel and Dr. Hans Frankenberg, in New York City on October 17, 1946. I was familiar with the transcript of the statements given by Mr. Fritz von Opel, having read a copy of said transcript. In the course of that proceeding as the transcript reflects, there appears the following language:

"Q. Well, as I understand it, according to your view, your father retained nothing. Why didn't he just give you the shares outright, rather than have this agreement?

A. He wanted, so to say, protection in case, if he would get what we call—How do you say it?—if he would become destitute, he then wanted a legal claim on me.

Q. Now, however, as you point out, he actually had no claim because he had not pursued his rights under the agreement?

A. Yes, sir; there never was any "niessbrauch" established. All my father had was a claim against me

personally; and this claim he renounced in the middle thirty's.

Q. Can you fix it any better than that; that is, as to the year?

A. In 1935 I offered my father to establish the "niessbrauch" right. That would have meant that I had to transfer to him the 100 shares of Uebersee stock, and also, my claim against the Uebersee amounting to about 11,000,000 Swiss francs.

My father refused to have anything to do with it for various reasons, the main reason being that there was a very strict Foreign Exchange Law in Germany, and my father thought he should not have any dealings under those foreign Exchange Regulations.

3425 The breach of some of them was punishable by death. It was a very strict and ruthlessly enforced law. That is the reason that he gave up not only the "niessbrauch", which he never possessed, but also any claim he might have had against me.

Q. Now, did he ever write to you outlining this release?

He went even further than that; he went to the German Government.

Q. Now, do you know which particular Department?

A. Oh, yes, sir.

Q. All right.

A. He first wrote to the local Branch of the Foreign Exchange Control Office in Wiesbaden.

Mr. Worthington: What it Devisen-Stelle?

The Witness: Yes; a Branch of the Devisen-Stelle. I think it was called the Collector of Internal Revenue who was in charge of those local offices.

By Mr. Looney:

Q. Was he located in Frankfort, or Wiesbaden?

A. Wiesbaden; from there his request was given to the superiors in Kassel.

From there it was forwarded to the highest authority in Berlin, a man by the name of Reichbank Direktor Wilhelm.

Q. Do you know his first name? Wilhelm's first name?

A. No; Wilhelm was his last name.

Q. Do you happen to know the address, by any chance?

A. No sir. He was the head of the Reichbank in Berlin or let us rather say, he was head of the Foreign Exchange Division of the Reichbank. They had several Direktors.

Q. What happened when it got there?

A. They, after long and thorough discussion, admitted to my father's lawyer that no "niessbrauch" existed; that my father had no claim against me, but that he had a patriotic duty to get Foreign Exchange for Germany and that they would put him under so-called "political pressure".

Q. Who was your father's lawyer at that time?

A. My father's lawyer at the time was Dr. Daniel Gros.

Q. Do you know where he resided, or where he had his office in Berlin?

3426 A. His office was in Berlin. It was Budapest Strasse, I guess it was 35, if I remember correctly.

Q. Do you happen to know his home address? Sometimes they are bombed out and you might find one and not the other.

A. He is now living in Wiesbaden, Germany, in the American Zone. He left Berlin.

Q. Did you participate in any of these conferences with the Reichbank?

A. No; I only was, of course, in touch with Dr. Gros.

Q. Now, what happened after they suggested to your father that he should produce some foreign exchange?

A. They applied political pressure to the person of the local Gauleiter Sprenger, in Frankfort.

Q. Do you happen to know his first name?

A. No, sir.

Q. Some of them we still have in custody.

A. I hope so.

Anyhow, Dr. Gros and I anticipated such moves, and to delay any action, I had offered to have a Public Accountant Firm, like Haskins & Seils, check into my financial situation.

I was sure I had no liquid assets, but the obligations; but I tried to forestall any tough actions by way of the local Gauleiter. But the Reichbank did not accept the offer, and nothing came out of it.

Q. Now, this letter which your father wrote, which originated at Wiesbaden, did he ever receive any answer from the Reichbank?

A. Dr. Gros was ordered to appear in Dr. Wilhelm's office in the summer of 1937; and there Mr. Wilhelm told him that they had no legal rights, but that they would apply political pressure. They did not give that in writing to Dr. Gros, but Dr. Gros in turn, confirmed the contents of the discussion in a letter to Mr. Wilhelm.

Q. Did anything further happen after that, in connection with this request?

A. No.

Q. Did your father ever have to pay anything to the Reichbank?

A. No; they were after foreign exchange. My father had no foreign exchange, and he could not pay and he did not pay anything."

3427. On October 17, 1946, Dr. Frankenberg when questioned, testified as follows:

Q. And you say that somebody imposed a fine on Wilhelm, because of his interest in the usufruct, just so much as you remember of it?

A. I do not know whether the fine was in connection with the usufruct, or much more with the fact that the Nazis minded very much that he turned over such a large amount of foreign funds to his son; and they wanted him to recuperate part of it, or whatever it was, or to cause or induce his son to give some part of it back, or something like that. That I would not remember; but Fritz would remember that better than I, I guess. What I do know is finally he received the permission of the Reichbank to renounce the gift, this usufruct agreement; and that was very hard to get, and he got it.

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A. At Berlin.

Q. At Berlin?

A. In charge was—Fritz tried to trace it already—in charge was Mr. Wilhelm of the Reichbank.

Q. Mr. Wilhelm?

A. Wilhelm, who unfortunately died. But furthermore, there was in charge his lawyer, who still is alive, and who can testify to this effect.

Q. Who is that?

A. That is Mr. Daniel Gros.

Q. Where does Mr. Daniel Gros live, as you knew it last?

A. I think he is in Berlin.

Q. In Berlin?

A. Yes.

Q. You think I will be able to locate all these people after I get over there.

A. Sure.

Q. But if I know the names and the people and the events, it is much easier to find them?

A. I am sure everybody will be delighted if you could do so.

Q. So that the records of the Reichbank in Berlin for 1936 should reflect this transaction.

A. It was not any transaction. I mean, you see, they just gave an opinion I would say, an opinion to the effect that he has no—they permitted him to state that he has no income out of the gift agreement whatsoever, and so on and so forth.

3428 Q. Now, in order to get that, he had to pay somebody something?

A. Well, may be it has to have been done in this particular instance. That I do not recall. But anyhow, I think this man Gros, he can produce some facts regarding negotiations with the Reichbank.

Q. Do you remember his first name—Mr. Wilhelm?

A. No, Wilhelm is the last name of the Reichbank man who died.

Q. Daniel?

A. Daniel Gros.

Q. Have you any idea where he lives, or his place of business?

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During the course of the taking of the depositions at Wiesbaden, Germany in September, 1947 Dr. Daniel Gros, an attorney representing Mr. Wilhelm von Opel, testified in connection with the waiver of Wilhelm and Marta von Opel of their interest in the proceeds of the gift of October 5, 1931. Dr. Gros testified concerning Plaintiff's Exhibits Nos. 96, 97, 98, 99, 100, 101. These exhibits clearly establish the steps taken by Wilhelm and Marta von Opel through their attorney Dr. Daniel Gros to effectuate a waiver of their interest in the proceeds of the gift. Depositions of Wilhelm and Marta von Opel, among others, were also taken in Wiesbaden on or about September 5, 1947. I believe Wilhelm von Opel was present at all times during the taking of depositions in Wiesbaden in connection with the present case. The Department of Justice was represented by Mr. Myron C. Baum and Mr. Joseph Laufer who cross-examined both Wilhelm and Marta von Opel as well as Dr. Daniel Gros.

3429 The circumstances and conditions under which the Wiesbaden depositions were taken were extremely difficult from the standpoint of accomodations, transportation, court reporting, etc. Many documents were identified during the course of these depositions. As advisor to Mr. Connor I did not think it necessary to suggest to him that he repeat the same or similar questions to each and every witness. However, it cannot be doubted that the issue of the waiver had been raised or that the Department of Justice had been on notice that such an issue was in the case. It appeared to me that there was no reason why the Department of Justice representatives could not have interrogated both Wilhelm and Marta von Opel in this respect. They were available for such an interrogation at all times.

(Signed) HEINRICH KRONSTEIN

Heinrich Kronstein

Defendant's Additional Memorandum in Opposition to Plaintiff's Motion for a New Trial, Filed May 26, 1949

3430 The plaintiff, on May 23, 1949, has filed a memorandum and additional affidavits in support of its motion for a new trial. Defendant respectfully submits the following in reply thereto:

1. Plaintiff states that the proffered testimony would be admissible as a declaration against interest by Wilhelm von Opel. As stated in defendant's original memorandum, an examination of Mrs. Firnhammer's affidavit clearly demonstrates that these purported statements were made in the context of proceedings against Wilhelm von Opel by the German government authorities, and were thus an attempt by Wilhelm von Opel to relieve himself of any form of liability in such proceedings. As such, statements were clearly self-serving and in no way declarations against interest.

2. The plaintiff still has not established that the purported evidence is newly discovered. Mrs. Firnhammer's statement (Appendix A to defendant's original memorandum) shows that Fritz von Opel, at least, had an idea that the witness might have knowledge of the relevant facts. This statement still stands. Plaintiff now files an affidavit by Mr. Gallagher, its attorney, who says he filed the motion as soon as *he* knew of the evidence.

3431 Plaintiff continues wholly to ignore the fact that the burden of due diligence is on the plaintiff and its representatives and not only on its attorneys. Consequently, any statement by Mr. Gallagher that he exercised due diligence falls far short of a showing that the evidence is newly discovered or that there was due diligence by the plaintiff.

3. Plaintiff admits that the testimony sought to be offered is cumulative and does not deny that it is corroborative of previous testimony (page 3 of plaintiff's memorandum). This, in and of itself, should be sufficient ground for a denial of this motion, since the cases cited in defendant's original memorandum show that one of the requirements which must be met before a motion for a new trial may properly be granted is that the proffered evidence is not corroborative *or* cumulative.

4. Plaintiff seeks to excuse its lack of due diligence by referring to plaintiff's exhibits 96, 97, 98, 99 and 101 as leading anyone to the conclusion that a waiver had been clearly shown. Exhibits 96, 98 and 101 do not speak of a waiver at all, but refer to arguments which had been advanced that no usufruct had ever been created and that the usufruct was therefore legally invalid. Exhibit 97, dated October 8, 1935, states that the parties "*intend* to take action" and "to declare explicitly, in a supplement *to be drawn up* to the deed of gift" that the usufruct was void, but nowhere states that a waiver had been made. Exhibit 99 cited by the plaintiff states as a fact, "The parents have an in personam claim to the establishment of a usufruct." This document is dated February 8, 1936, considerably after any waiver is alleged to have taken place. All these documents were executed while the gold case was pending in this country, in which case plaintiff represented that a usufruct was in existence. Plaintiff can hardly be permitted to be relieved of its failure to use due diligence in the face of such adverse evidence.

5. Defendant, in his original memorandum, pointed out that the purported evidence, even if admissible, would not show a waiver by Marta von Opel, since the alleged new witness does not claim to know of any declara-
3432 tions as to waiver by Marta. Plaintiff seeks to meet this by stating that from all of the testimony in this case, the Court is well aware that Wilhelm von

Opel made all the decisions for his wife. There is no such testimony in this record, nor is there any testimony that, under German law or any other law, Wilhelm von Opel could have waived *property rights* belonging to his wife.

Retreating to a secondary position, plaintiff then states that if this motion is granted, the Court should also hear the testimony of Marta von Opel on this matter. Marta von Opel has testified in this action by deposition, which has been read into the record, and her testimony contains no statement whatsoever as to waiver. Is the plaintiff now seeking to claim that testimony from Marta von Opel as to waiver is newly discovered evidence which would justify a new trial?

6. Defendant in its original memorandum and at the trial pointed out to the Court that neither Wilhelm nor Marta von Opel gave any testimony whatsoever as to a waiver having been made. Plaintiff now makes the disingenuous argument that its failure to elicit such testimony is excused by the fact that the defendant's counsel should have elicited such testimony. Plaintiff is thus asserting that defendant's attorneys should have elicited testimony to attempt to support plaintiff's case. Such a proposition is sufficiently transparent as to require no further comment.

Plaintiff further submits an affidavit by Heinrich Kronstein who states that he acted as advisor to Mr. Connor in taking depositions of Wilhelm and Marta von Opel in Germany. Referring to the absence of testimony from Wilhelm and Marta von Opel as to waiver, Mr. Kronstein makes the following justification, "As advisor to Mr. Connor I did not think it necessary to suggest to him that he repeat the same or similar questions to each and every witness." In other words, plaintiff's advisor is now making the almost incredible assertion that he did not think it necessary to ask Wilhelm and Marta von Opel, the holders of the usufruct, whether they had waived their

usufruct. This is an interesting proposition since
3433 the plaintiff itself had asserted in the Gold case that the usufruct was in existence as late as May 25, 1936. Again, plaintiff is complaining that defendant's attorneys did not attempt to support plaintiff's case, when plaintiff itself failed to do so.

Plaintiff, in its memorandum, has seen fit to go outside the record in this case and to quote at length certain passages from an interrogation of Fritz von Opel conducted informally in 1946. The purpose of this is to show that defendant had knowledge that waiver was an issue in this case. Defendant's previous knowledge as to the issues is, of course, immaterial. In any event, the testimony quoted out of the mouth of Fritz von Opel states that Wilhelm von Opel refused to have anything to do with a usufruct and that a usufruct never existed. Plaintiff also refers to the testimony by deposition of Dr. Gros in Germany which is also not in evidence. If the Court wishes to examine such testimony, it will find that at no place in that testimony did Dr. Gros state that Wilhelm von Opel had waived a usufruct, but referred only to arguments that the usufruct was allegedly invalid. His subsequent actions on this matter, purportedly evidenced by plaintiff's exhibits 96, 97, 98, 99, 100 and 101, which were identified at the time of that deposition, are similarly lacking in probative value, since, as previously pointed out, exhibits 96, 98 and 101 do not refer to a waiver at all, plaintiff's exhibit 97 refers to a waiver to be executed in the future (after October 8, 1935) and plaintiff's exhibit 99 of February 8, 1936 and 100 of March 11, 1936 refer to the *existence* of a claim for the establishment of a usufruct. All of this, of course, is to be read in connection with plaintiff's assertions as to the existence of a usufruct in the Gold case. These assertions completely negate the purported evidence referred to by plaintiff.

7. Defendant respectfully renews his request that
3434 the motion for a new trial be denied in all respects.

Memorandum of District Court Denying Motion For New Trial, Filed June 16, 1949

3435 On May 5, 1949, judgment was entered in the above-entitled cause in favor of the defendant on the merits, with the provision that defendant have and recover from plaintiff costs and have execution therefor. On the same day plaintiff filed a motion for a new trial on newly discovered evidence. On May 9, 1949, defendant filed a motion for an order requiring plaintiff to furnish security in the amount of Three Thousand Dollars for costs which might be awarded to defendant in this case and from an order staying plaintiff from taking further proceedings until such security is furnished.

Plaintiff's motion for a new trial will be denied.

As to defendant's motion to require plaintiff to give security for costs, it appears the Code of Law for the District of Columbia, in giving this Court discretion to require security for costs, deals with a time before, but not after, judgment. While the language refers to serving a notice for security for costs at any time, the remedy provided for not giving such security is by way of non-suit or dismissal of plaintiff's case, which actions may be accomplished only before entry of final judgment. Moreover, if it be granted this Court has discretion to order such security, in my judgment it should not exercise such discretion at this late date. Motion for security for costs accordingly will be overruled.

BOLITHA J. LAWS
Chief Judge

June 15, 1949

Order of Court Denying Motion for New Trial, Filed June 21, 1949

3436 This cause came on to be heard before me on plaintiff's motion for a new trial on the basis of newly discovered evidence and on defendant's motion to require plaintiff to furnish security in the amount of $3,000.00 for the costs which might be awarded to defendant and for an order staying the plaintiff from taking further proceedings in this action until such security is furnished, and after hearing argument of counsel for plaintiff and defendant on said motions and due deliberation having been had thereon, now, therefore, it is

ORDERED that plaintiff's motion for a new trial on the basis of newly discovered evidence be, and the same hereby is, in all respects denied and it is further

ORDERED that defendant's motion to require plaintiff to furnish security in the amount of $3,000.00 for the costs which might be awarded to the defendant in this action and for an order staying the plaintiff from taking further proceedings until such security is furnished be, and the same hereby is, in all respects denied.

DATED, June 21, 1949.

BOLITHA J. LAWS
Chief Judge

No objection as to form.

Walter E. Gallagher
Attorney for Plaintiff

Notice of Appeal, Filed August 12, 1949

3437 NOTICE IS HEREBY GIVEN that the plaintiff, Uebersee Finanz-Korporation, A. G., hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on May 5, 1949, and from the order denying the plaintiff's motion for a new trial entered in this action on June 21, 1949.

ARNOLD, FORTAS & PORTER

By

Thurman Arnold

1200 Eighteenth Street, N. W.
Washington 6, D. C.

Attorneys for Plaintiff-Appellant
Uebersee Finanz-Korporation, A.G.

Order of Substitution of Defendant, Filed December 8, 1949

3439 On consideration of appellant's motion to substitute J. Howard McGrath, present Attorney General of the United States, for appellee Tom C. Clark in this case, and it appearing that counsel for J. Howard McGrath has consented hereto, It is

ORDERED by the Court that J. Howard McGrath, Attorney General of the United States, be, and he hereby is, substituted as appelee herein in the place and stand of appellee Tom C. Clark.

Per curiam.

Dated December 8, 1949.

1

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 26,453

UEBERSEE FINANZ-KORPORATION, A. G.,

Plaintiff,

—v.—

TOM C. CLARK, Attorney General, As Successor to the Alien Property Custodian,

Defendant.

Washington, D. C.
Wednesday, December 8, 1948.

This case came on for trial at 2 o'clock p.m. today, before Chief Judge BOLITHA J. LAWS.

Appearances:

For plaintiff:

MR. WALTER E. GALLAGHER,
MR. JOHN L. INGOLDSBY, JR., and
MR. CHRISTOPHER T. BOLAND.

For defendant:

MR. JOHN L. BURLING,
MR. MYRON C. BAUM,
MR. JOSEPH LAUFER, and
MR. ERNEST GOLDSTEIN.

45 Mr. Gallagher: If Your Honor please, the depositions we are about to read are a little lengthy; and, for the convenience of the Court, we would like to suggest that Mr. Ingoldsby sit in the witness chair and give the responses to the questions that are put.

The Court: All right.

Mr. Gallagher: I now offer the deposition, in part, of Wilhelm von Opel, of Wiesbaden, Germany, taken in this matter on September 5, 1947, at Wiesbaden, Ger-
46 many.

The Court: Whose deposition is it?

Mr. Gallagher: The deposition of Mr. Wilhelm von Opel, the father of Fritz von Opel.

Mr. Burling: We concede the admissibility of that deposition, Your Honor, on the ground that Mr. Wilhelm von Opel is dead.

The Court: You concede it?

Mr. Burling: I don't concede the admissibility of every part.

The Court: All right.

DEPOSITION OF WILHELM VON OPEL.

49 Mr. Gallagher (resuming reading from deposition):

"September 5, 1947, 10:00 a.m.—

"WILHELM VON OPEL a witness, was called and having been first duly sworn, was examined and testified as follows:

"*Direct Examination*

"By Mr. Connor:"

(Thereupon the reading from the deposition proceeded as follows, Mr. Gallagher reading the questions, and Mr. Ingoldsby, on the witness stand, reading the answers):

"Q. Mr. von Opel, what is your full name?
"A. Wilhelm Albert von Opel.
"Q. Where do you live?
"A. In Wiesbaden.
"Q. How long have you resided in Wiesbaden?
"A. Since 1929.
"Q. Where did you reside before 1929?
"A. In Ruesselsheim.
"Q. That is in Germany, of course?
"A. Between Mainz and Frankfurt where the plant of Opel is.
"Q. How long did you live in Ruesselsheim?
"A. 57 years.
"Q. Where were you born?
"A. In Ruesselsheim.
"Q. In what year?
"A. In the year 1871 on May 15.
"Q. What is your present business?
"A. I have no business any more.
"Q. You are retired?
"A. I am retired but I am a member of several boards of supervisors. I even resigned from five memberships because I was a member of the Party.
"Q. Before you retired from business, what business were you engaged in?
"A. In the Opel plants or works.
"Q. And what was the business of the Opel Works?
"A. The production of sewing machines, bicycles, automobiles and motorcycles.

"Q. What was the name of the firm?

"A. Adam Opel. Later it was called Adam Opel, A.G.

"Q. How long were you connected with Adam Opel, A.G.?

"A. About fifty years.

"Q. Do you know who established or founded Adam Opel?

"A. My father.

"Q. So the firm of Adam Opel was a family enterprise, was it not?

51 "A. Until at the death of my father, my father was the only owner of Adam Opel. He died in 1895. Then we, the sons, became co-owners.

"Q. How many sons became the co-owners?

"A. We were five brothers. As long as the mother was alive she was co-owner together with the five brothers.

"Q. When your mother died, the five brothers became the co-owners?

"A. Yes.

"Q. Was the name of one of those brothers, Fritz Opel?

"A. Yes.

"Q. You also had a son named Fritz von Opel, did you not?

"A. Yes.

"Q. About how old is your son, Fritz von Opel?

"A. He was born in 1899. He is forty-eight years of age.

"Q. Do you know where your son is at this time?

"A. He lives in the United States.

"Q. Do you have any other children?

"A. I have one daughter living in Switzerland.

"Q. You have no other children than this daughter and your son Fritz?

"A. I had a third child, a daughter who died.

52 "Q. What is the name of the daughter who is living in Switzerland?

"A. Elinor.

"Q. What is her present last name?

"A. Sachs but she is divorced and uses her maiden name.

"Q. Where does she live in Switzerland?

"A. Lenzerheide.

"Q. What school was Fritz, your son, educated at?

"A. In Mainz Raelgymnasium.

"Q. And what business or profession was he educated for?

"A. He learned the practical craftsmanship of a turner and mechanic. He graduated from the Raelgymnasium and then graduated from the Technische Hochschule in Darmstadt as an engineer.

"Q. Do you remember about when he graduated from the school at Darmstadt?

"A. About 1924.

"Q. And then did he become connected with the Adam Opel firm?

"A. Yes, then he entered the firm.

"Q. And what was his position or capacity at the firm in 1929?

"A. In 1929 he was an engineer in the firm.

53 "Q. In 1929 some interest in the Opel firm was sold to the General Motors Corporation of the United States, was it not?

"A. Yes.

"Q. Well, just before the sale of an interest in the firm to General Motors, what position did Fritz have with the firm?

"A. A leading position in the firm in the production branch. He was furthermore a member of the Board of Directors.

"Q. Who was president of Adam Opel, A.G., in 1929?

"A. I was.

"Q. What position in the firm did your brother Fritz Opel hold?

"A. My brother was in charge of the construction office of the firm.

"Q. Were any other of your brothers alive in 1929?

"A. When we sold the firm, only two of us brothers were alive, the others died before.

"Q. How many shares of stock were there in Adam Opel, A.G., in 1929?

"A. Only shortly before we sold the firm we transformed this firm into a corporation with a capital of 60,000,000 marks. Each share had a par value of 10,000 marks.

54 "Q. How many shares did you own?

"A. One-fourth. That means 15,000,000 RM per value shares.

"Q. Did your brother Fritz Opel own the same number of shares as you?

"A. Yes.

"Q. And was another quarter of the shares owned by the children of one of your brothers who had died?

"A. Yes. Each branch of the family got by inheritance the same share in stock.

"Q. But there were originally five brothers?

"A. One brother died in the World War in 1916.

"Q. The brother who died in the war left no children?

"A. He had no children and he was not married."

Mr. Gallagher (reading): "Afternoon Session, 1:00 P.M."

(The reading from the deposition continued, Mr. Gallagher reading the questions and Mr. Ingoldsby reading the answers:)

"Q. When he died his share of the firm went to the surviving four brothers?

"A. The brother who died in the war intended to give me his whole share but I insisted that in the interest of the unity of the family every brother receive the same share.

"Q. In 1929 were some of the shares sold to the
55 General Motors Corporation of the United States?

"A. All shares had been sold in 1929 with the exception of 600 shares which I retained and another 600 shares which my brother Fritz retained with a par value of each 10,000 Reichsmarks.

"Q. After 1929 did you make an agreement with General Motors to sell your shares to them?

"A. When the principal sale was made it was agreed that the remaining shares shall be sold too. It was agreed at a certain price in case I insisted on the sale and another price in case General Motors insisted on the sale.

"Q. In other words, you had an agreement which gave General Motors an option to buy at a certain price?

"A. Yes I did.

"Q. And also an agreement that you could compel General Motors to buy at a certain price?

"A. Yes.

"Q. At the time the shares were sold in 1929 did General Motors want you and your brother Fritz to retain some of the shares?

"A. Yes.

"Q. Can you explain why General Motors wanted you and your brother to keep some of the shares?

Mr. Burling: There is an objection to that, your Honor. That calls for an opinion of the witness as
56 to the state of mind of the General Motors officials. How could the witness know how General Motors wanted it?

The Court: Gentlemen, I think in this case, unless the testimony adopts a very remote line, I will hear it all the way through. I think that would be of advantage to Mr. Gallagher in his case, and to you in yours.

In any event, where we get off into any completely remote subject, of course I will deal with it. But where we

come to these little points, like that, I am just as familiar with that point as I can be.

Mr. Burling: I am sure Your Honor is.

The Court: And it doesn't make any imprint on my mind. So you needn't worry about those matters.

Mr. Burling: There is one matter that counsel and I will have to have an argument on, Your Honor.

The Court: You won't reach that tonight, will you?

Mr. Gallagher: I think we will reach that rather soon. It is going to come out of this deposition, Your Honor.

The Court: Within the next ten or fifteen minutes, do you think we will reach it?

Mr. Gallagher: I think we will.

The Court: Then reach up to that point, and then we will stop.

Mr. Gallagher: All right, sir.

57 Mr. Ingoldsby (reading answer to the last question read from the deposition):—

"A. General Motors was very much interested to accomplish that we retain an interest in the firm. I remained chairman of the Board of Supervisors and my brother remained a member of the Board of Supervisors. We helped to further develop their enterprise."

Mr. Gallagher: I now ask to have marked as Plaintiff's Exhibit 3 a photostatic copy of a letter from Wilhelm von Opel to the National City Bank. It is stipulated by the parties that it is a true and correct copy of the letter.

(The photostatic copy of the letter was accordingly marked for identification as Plaintiff's Exhibit No. 3.)

Mr. Gallagher: And I now ask that the German photostat copy be marked as Plaintiff's Exhibit 3-A.

(The copy of the letter in German was accordingly marked for identification as Plaintiff's Exhibit No. 3-A.)

(Resuming from the deposition, Mr. Gallagher reading the questions, and Mr. Ingoldsby the answers):

"Mr. Connor: Mr. von Opel, I will show you a document addressed to the National City Bank and signed by you and ask you to read that if you will. That is, look it over.

"A. Yes.

58 "Q. That is not your written signature, is it, Mr. von Opel?

"A. No, it is not.

"Q. Is this a copy of a letter which you sent to the National City Bank?

"A. I remember that I wrote such a letter.

"Q. Before you sent this letter to the National City Bank you had entered into an agreement for the sale of the shares with General Motors, had you not?

"A. When the principal sale was made my brother and I had been asked to retain a certain interest in the firm. It is provided either in the principal agreement or in a supplementary agreement that we should retain the shares.

"Q. Do you know where the original copies of those agreements are?

"A. I already looked for this contract. I had to evacuate the office in which I worked for a long time within a period of two and one-half hours. I don't know where the contracts are. I couldn't find this contract although the period of evacuation was extended to one whole day."

Mr. Gallagher: I now offer Plaintiff's Exhibit 3 and Plaintiff's Exhibit 3-A in evidence.

The Court: Very well.

59 (The documents heretofore marked for identification as Plaintiff's Exhibit 3 and 3-A were accordingly received in evidence.)

(The reading from the deposition was resumed):

"Q. Together with this letter of April 11, 1929 you did send shares numbered from one to six hundred of Adam Opel, A.G. to the National City Bank, did you not?

"A. I remember that such a thing happened."

"Q. After you sent the shares of stock to the National City Bank in April, 1929, did those shares of stock remain with the bank until 1931?

"A. Yes, as far as I know.

"Q. Can you read any English at all, Mr. von Opel?

"A. It is very difficult for me to read English. I might realize what the general meaning is."

Mr. Gallagher: I now ask to have marked as Plaintiff's Exhibit 4 the power of attorney given to Fritz by his father. It has been admitted by the defendant that this is a true and correct copy.

(The copy of power of attorney was accordingly marked for identification as Plaintiff's Exhibit No. 4.)

Mr. Gallagher: And I also ask to have marked as
60 Plaintiff's Exhibit 4-A a copy of the certificate of acknowledgement by the counsel, also dated the same date.

(The copy of certificate of acknowledgement was accordingly marked for identification as Plaintiff's Exhibit 4-A.)

Mr. Gallagher: I believe, Mr. Ingoldsby, there is no pending question, but there is another answer after the identification.

(The reading from the deposition was then resumed):

"A. I am sure that this document exists also in German.

"Q. If such a document exists in German, do you know where it is?

"A. I don't know. I have no idea where it might be but I remember that such a paper has been executed.

"Q. Do you recollect that you executed such a document and gave it to your son Fritz?

"A. I remember that I gave a power of attorney to my son to act on my behalf.

"Q. And do you recollect that the power of attorney you gave to your son was dated on or about October 6, 1931?

"A. There is too much time elapsed between the date of this transaction and this day that I could be sure of the date but since our transaction took place in 1931 I
61 assume that the date on the document is correct.

"Q. Is it your recollection that this appears to be an English translation of the power of attorney you gave to your son Fritz some time during the year 1931?

"A. Yes, I gave my son a power of attorney entitling him to deal with the shares however he liked."

Mr. Gallagher: I now offer the documents, Plaintiff's Exhibit 4 and Plaintiff's 4-A.

The Court: Very well.

(The documents heretofore marked for identification as Plaintiff's Exhibit 4 and 4-A were accordingly received in evidence.)

Mr. Gallagher: I now ask to have marked as Plaintiff's Exhibit 5 the original of a gift agreement dated October 5, 1931, and I ask leave of the Court to substitute therefor a photostatic copy of that document.

The Court: All right.

(Copies of the gift agreement were accordingly marked for identification as Plaintiff's Exhibits 5 and 5-A, in English and in German, respectively.)

(The reading from the deposition was resumed as follows):

"Q. Mr. von Opel, did you and Mrs. von Opel ever make a gift to your son Fritz?

62 "A. Yes.

"Q. Do you remember when this gift was made?

"A. In the year 1931.

"Q. In connection with that gift, was a document drawn?

"A. Yes, a paper was executed.

"Q. Do you remember who drew that document?

"A. A document was re-written by Wronker-Flatow. It was originally drafted by the attorney Hachenburg but Hachenburg's draft was in another form.

"Q. Do you know where the original document of the gift agreement is at this time?

"A. I looked for it but I did not find it.

"Q. So the answer to the question is that you do not know where it is?

"A. Yes.

"Q. I will show you a document bearing the date Ruesselsheim, the 5th of October 1931, then I will ask some questions about it. To the best of your recollection is this a copy of the original gift agreement?

"A. Yes."

Mr. Gallagher: And I now offer the original gift agreement from which this copy was made, and which the defendant has heretofore admitted was a true and correct copy of the original.

63 The Court: It may be received.

(The documents heretofore marked for identification as Plaintiff's Exhibits 5 and 5-A were accordingly received in evidence.)

Mr. Gallagher: I now direct your attention to page 13, Mr. Ingoldsby, to the line beginning "Now to go back to 1929", after the offer of the Exhibit 5, at the middle of the page.

Mr. Ingoldsby: Yes.

(The reading from the deposition was accordingly resumed):

"Q. Now to go back to 1929 when Adam Opel, A.G. was sold to General Motors, was your son Fritz happy or unhappy about that sale?

"A. Very unhappy.

"Q. Can you briefly explain why?

"A. He was the man who was able to continue the management of the firm. But a number of prince consorts were brought in. They all wanted to play the general manager.

"Q. Just prior to the time the plant was sold to General Motors was Fritz the general manager of the whole plant?

"A. He was one of the managers of the whole plant.

"Q. How many managers were there?

"A. Three.

"Q. After the Opel Works was sold to General
64 Motors in 1929, where did Fritz go?

"A. He went to the United States.

"Q. Did he go with General Motors?

"A. Yes, he did.

"Q. And did he work in some of the General Motors plants in the United States?

"A. Yes, he worked as a volunteer in several of the plants.

"Q. About how long did he work for General Motors in America?

"A. For about three-fourths of a year.

"Q. And then was he sent to Antwerp by General Motors?

"A. Yes.

"Q. In their Export Division?

"A. Yes, he was sent there to learn their export business.

"Q. I asked a little while ago why Fritz was unhappy about the sale to General Motors in 1929?

"A. He expected to become the leading man in the family firm. He felt that for all practical purposes I had sold his future and his position.